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Supreme Court, U.S.
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No. 03-651

IN THE

Supreme Court of the United States

SALVATORE GRAVANO,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

REPLY BRIEF

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Remarkably, the State of Arizona effectively concedes both that it disagrees with this Court's decision in *Simon & Schuster, Inc.* v. *Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991), and that the *Simon & Schuster* decision would not permit a government to "appl[y] . . . a general forfeiture statute to royalties from an expressive work based on the content of the work." Br. in Opp. at 15 (suggesting that the Court "may want to revisit" the *Simon & Schuster* decision should such a case arise). But that is precisely what happened here, and if, as the State suggests, a "revisiting" of *Simon & Schuster* is appropriate in these circumstances, the Court should grant certiorari here in order to undertake it. Indeed, those portions of the State's Brief in Opposition that do not directly bolster Petitioner Salvatore Gravano's assertion that certiorari is appropriate here fail to undermine Gravano's showing that certiorari should be granted.

1. Although the State acknowledges that *Simon & Schuster* does not permit a state to apply a general forfeiture statute to royalties from an expressive work "based on the content of the work" (*ibid.*), its arguments are no answer to the fact that the application of Arizona's racketeering forfeiture statute to *Underboss* was expressly premised – as the Court of Appeals made plain in its very first sentence – on the court's understanding of *Underboss* as "a book about the life and crimes of a convicted racketeer." Pet. App. at 2a; *see also* Pet. at 7-9.

None of the State's theories can erase the Court of Appeals' overtly content-based reasoning, or provide any justification for leaving the Court of Appeals' decision intact. The State's attempt to collapse together the concepts of content-neutrality and viewpoint-neutrality (Br. in Opp. at

5), for example, is contrary to bedrock First Amendment doctrine. *See Hill* v. *Colorado*, 530 U.S. 703, 723 & n.31 (2000). Likewise, the State's assertions that the Court of Appeals reached its essential conclusions about the content of *Underboss* without reading the book (Br. in Opp. at 6), and because Gravano openly acknowledges that *Underboss* is the story of his life of crime (*id.* at 7-8), do nothing to obscure the Court of Appeals' reliance on its understanding of the book's content to justify the application of the forfeiture statute.

Importantly, the State makes no attempt to deny that the Court of Appeals' reasoning would also justify the forfeiture of royalties earned from the broad array of works cited in the Petition (Pet. at 11-13 & nn.2-9), instead noting only that in actions for forfeiture related to those books, the government would have to establish that their authors had contractual rights to receive compensation from them (Br. in Opp. at 9-10) – a showing that would seldom be difficult to make. Paradoxically, in attempting to counter the Petition's showing that the application of Arizona's racketeering forfeiture statute to book royalties is a much less narrowly-tailored means of furthering legitimate objectives than the "Son-of-Sam" law struck down in *Simon & Schuster*, the State argues that a complete and permanent forfeiture is somehow *less* burdensome than a temporary and (possibly) partial escrow (Br. in Opp. at 13-14) – a proposition that confounds common sense.

The State's attempt to convey the unsupported and false impression that Gravano's role in the creation of *Underboss* was limited to a few hours of "endors[ing]" and "promot[ing]" the book (Br. in Opp. at 2) is likewise unavailing. In his contract with Peter Maas, Gravano

promised not only to promote the book but significantly also to "cooperate" with Maas in "preparing" it (*see* Ex. B. to State's Response to Motion for Partial Dismissal Re: Book Proceeds in No. CV 2000-007692 (Maricopa County Superior Court)), and in fact, the lion's share of the 481-page book consists of direct quotes taken from extensive taped sessions with Maas in which Gravano recounted his experiences. *See generally Underboss: Sammy the Bull Gravano's Story of Life in the Mafia* (HarperCollins*Publishers* Inc. 1997). Indeed, even the Court of Appeals acknowledged that Gravano's right to receive royalties was earned through work that was "expressive in nature." Pet. App. at 13a; *see also New York State Crime Victims Bd.* v. *T.J.M. Prods., Inc.*, 705 N.Y.S.2d 320, 323 (N.Y. App. Div. 2000) (describing *Underboss* as "a book by one Salvatore Gravano").

Thus, the State fails to explain how the Court of Appeals' acceptance of its content-based seizure of expression-derived income can be squared with this Court's *Simon & Schuster* decision.

2. The Court of Appeals decision paves the way for the application of innumerable forfeiture statutes to royalties earned from expressive works in a fashion that would effectively render *Simon & Schuster* a nullity. The Court of Appeals decision also tends to suppress a broad range of expression by speakers unwilling to risk foregoing all right to compensation for their efforts in producing it. The State's response fails to counteract these compelling reasons for granting certiorari.

Not only has the State effectively conceded that the scores of forfeiture laws cited in the Petition might be applied to expression-derived income just as Arizona's statute was

applied here, but even in respect to the Arizona statute, the State offers only the unexplained speculation that a similar application is "unlikely to reoccur" (Br. in Opp. at 15) – an equivocation that is woefully inadequate to dull the speech-suppressing effect of the Court of Appeals' decision. And contrary to the State's suggestion, there is nothing "unique" (*ibid.*) or extraordinary about states moving aggressively with respect to expression by persons who have committed racketeering offenses – as *Simon & Schuster* itself, as well as the fact that not one but two States acted to seize Gravano's *Underboss* royalties (*see* Pet. at 3-4), demonstrate. Nor is the public's interest in the expression of such persons "unique" to this case.

The State has thus failed to negative the Petition's showing that the Court of Appeals decision conflicts sharply with this Court's *Simon & Schuster* decision and its progeny, implicates a broad array of state and federal forfeiture statutes as to which the court's reasoning might be similarly applied, and threatens to remove a substantial quantity of protected speech from the marketplace of ideas. The Petition should therefore be granted.

Respectfully submitted,

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